

Dec-18-06 04:16pm From-EEOC SE.  
EEOC Form 6 (501)

206 220 6811

-773 P.001/002 F-759

**CHARGE OF DISCRIMINATION**

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

☐ FEPA☒ EEOC

551-2007-00614

**Oregon Bureau of Labor and Industries - Civil Rights Division**

and EEOC

State or local Agency, if any

Name (Indicate Mr., Ms., Mrs.)

Home Phone (Ind. Area Code)

Date of Birth

Street Address

City, State and ZIP Code

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)

Name

No. Employees, Members

Phone No. (Include Area Code)

STATE OF OREGON

500 or More

(503) 387-3805

Street Address

City, State and ZIP Code

Dept. Of Public Lands, 775 Summer St. NE, Suite 100, Salem, OR 97301

Name

No. Employees, Members

Phone No. (Include Area Code)

Street Address

City, State and ZIP Code

DISCRIMINATION BASED ON (Check appropriate box(es).)



RACE



COLOR



SEX



RELIGION



NATIONAL ORIGIN



RETALIATION



AGE



DISABILITY



OTHER (Specify below.)

DATE(S) DISCRIMINATION TOOK PLACE

Earliest

Latest

11-17-2006



CONTINUING ACTION

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)).

I was employed as a

I opposed employment discrimination based on my race, my color, my national origin, my age, and retaliation.

On or about , I was discharged from my employment.

I believe that I was discharged in retaliation for opposing discrimination as described above, in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act, as amended. I also believe that I was discharged because of my race, my color, and my national origin, in violation of Title VII, and my age, in violation of the ADEA.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

Date

Charging Party Signature

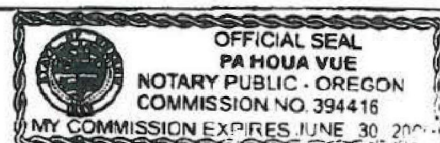
NOTARY - (When necessary for State and Local Agency Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE  
(month, day, year)

Dec. 20, 2006



Ref # U37104

SSN: [REDACTED]

46-07 UI

FO: [REDACTED]

STATE OF OREGON  
Before the Office of Administrative Hearings  
for the Employment Department  
PO Box 14020  
Salem, OR 97309-4020

Dec Mailed:

01/09/07

Dec Final:

01/29/07

Mailed By:

TVG00

Case #:

**HEARING DECISION ♦ DECISIÓN DE LA AUDIENCIA**

## CLAIMANT/RECLAMANTE

[REDACTED]

[REDACTED]

[REDACTED]

## EMPLOYER/EMPLADOR

DIVISION OF STATE LANDS  
775 SUMMER ST NE

SALEM

OR 97301-1271

The following **HEARING DECISION** was served to the parties at their respective addresses.  
La siguiente **DECISIÓN DE LA AUDIENCIA** fue servida a cada partidario a sus domicilios respectivos.

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
EMPLOYMENT DEPARTMENT**

IN THE MATTER OF

██████████, Claimant

) **FINAL ORDER**

)

) Ref#:

) SSN:

) FO:

) NM Code(s):

**HISTORY OF THE CASE**

On December 11, 2006 the Employment Department issued an administrative decision that found that the employer discharged claimant for misconduct connected with work. The claimant appealed. On January 9, 2007 a hearing was held. The claimant participated in the hearing and testified on his own behalf. Neither the employer nor the Employment Department participated in the hearing.

**ISSUES**

Shall claimant be disqualified from the receipt of benefits because of a separation, discharge, suspension or voluntary leaving from work? (ORS 657.176, ORS 657.190 and OAR 471-030-0038.)

**EVIDENTIARY RULINGS**

No exhibits were offered or admitted into the record.

**FINDINGS OF FACT**

(1) The Division of State Lands employed claimant from ██████████ until ██████████. The employer discharged claimant for tardiness, working past his scheduled hours, and for attending a PERS meeting at a time when claimant was supposed to be working in the field.

(2) On ██████████ the employer sent claimant a letter informing him that he was discharged. The employer asserted that claimant had violated the employer's attendance expectations by arriving late to work and working later than scheduled. While working for the employer, claimant observed other employees arriving to work later than scheduled and remaining at work late. Claimant believed that the employer allowed employees some flexibility in arrival and departure times. Many times claimant was delayed leaving work due to work-related phone calls that went beyond the time claimant was scheduled to leave.



The [REDACTED] letter also stated that claimant failed to work in the field on October 6, 2006 and lied to the employer in order to avoid that work. Claimant credibly testified that he truthfully informed his supervisor that he wanted to remain closer to his home so that he could respond quickly in the event of an emergency involving his son who suffered from [REDACTED]. Claimant was scheduled to work in Blue River, Oregon, 138 miles from home. Claimant normally worked 50 miles from home. Claimant's manager approved claimant's request not to work in the field. There is no evidence in the record that claimant gave false information to his supervisor in order to avoid working.

The employer's letter also stated that claimant attended a PERS meeting on October 6, 2006 without authorization. Claimant credibly testified that he had authorization to attend that meeting along with other employees. The employer did not participate in the hearing and thus presented no evidence as to what authorization was required. Nor did it establish that claimant did not have such authorization.

When an employer charges an employee with misconduct that would disqualify the employee from receiving unemployment insurance benefits, the employer bears the burden of sustaining such a charge by a reasonable preponderance of the evidence. *Giese v. Employment Div.*, 27 Or App 929 (1976), rev den 277 Or 491 (1977). Because the employer did not participate in the hearing, it did not present evidence to meet this burden. The employer discharged claimant but not for misconduct connected with work.

#### ORDER

The administrative decision mailed December 11, 2006 is set aside. Claimant is not subject to disqualification from benefits under

John Mann  
Administrative Law Judge  
Office of Administrative Hearings

#### APPEAL RIGHTS

You may appeal this decision by filing an Application for Review with the Employment Appeals Board within 20 days of the date that this decision is mailed. See ORS 657.270(4). For directions regarding how to file an Application for Review, please refer to the enclosed information. If you have further questions, please refer to the publication 'Rights of Review of a Hearing Decision' (UI Pub 15), copy enclosed. If the publication 'Rights of Review of a Hearing Decision' was not enclosed with this decision, call the Office of Administrative Hearings at 1-800-311-3394.

Public Assistance and Food Stamps may be denied if a decision denying unemployment insurance benefits becomes final without an appeal.



NOTICE: If this decision reverses any initial decision to pay benefits on your claim and if this decision becomes final without further appeal, an overpayment may be determined to exist. Further benefits otherwise payable during the benefit year may be deducted to recover the erroneous payment. After the final date indicated on this decision, you will receive further information regarding your overpayment.

*Se puede apelar esta decisión al pedir una revisión dentro del plazo de 20 días después de la fecha en que esta decisión se la envió por correo. Vea ORS 657.270(4). Para las direcciones con respecto a cómo entablar una aplicación para revisión, refiera por favor a la información incluida. Si usted tiene otras preguntas, refiera por favor a Los derechos de revisión de una decisión de audiencia (publicación UI 15-S), una copia incluida. Si la publicación 'Los derechos de revisión de una decisión de audiencia' no fue incluida con esta decisión, llame a la Oficina de audiencias administrativas marcando 1-800-311-3394.*

*Los sellos de alimento (food stamps) y la ayuda pública pueden ser negados si una decisión que niega los beneficios de desempleo llega a ser final sin una apelación.*

*AVISO: Si esta decisión invierte cualquier decisión inicial para pagar beneficios en su reclamo, y si esta decisión llega a ser final sin apelación adicional; se puede determinar que un pago excesivo existe. Más, otros beneficios determinados de ser debidos durante el año de beneficios se pueden deducir para recuperar el pago erróneo. Después de la fecha final indicada en esta decisión, usted recibirá información adicional con respecto a su pago excesivo.*

#### **Servicemembers' Civil Relief Act**

No party, unless stated above, has notified the Office of Administrative Hearings (OAH) that any participant is a person in military service subject to the Servicemembers' Civil Relief Act. The OAH has no reason to believe that a party to this matter is subject to the Act. If a party to the proceeding is a service member and did not appear for the hearing, within the service members period of service, or 90 days after his/her termination of service, the OAH will review any request from the service member to reopen or vacate the decision if the service member can show that he or she has a good and legal defense to the claim and can show prejudice resulting from not being able to appear personally in the matter.

*Ningún partido, a menos que esté indicado arriba, se ha notificado a la Oficina de audiencias administrativas que cualquiera de los participantes implicados es una persona en el servicio militar sujeto al Acto de alivio civil para los militares (Servicemembers' Civil Relief Act). La Oficina de audiencias administrativas no tiene razón para creer que un partido a este asunto está sujeto al Acto. Si un partido del asunto es un miembro del servicio militar y no apareció para la audiencia, dentro del servicio militar del miembro o dentro de los 90 días después de la terminación del servicio del miembro, la Oficina de audiencias administrativas revisará algún pedido del miembro del servicio para volver a abrir o para desalojar la decisión si el miembro del servicio puede mostrar que tiene una causa buena y una defensa legal al reclamo y si puede mostrar el perjuicio resultando de no ser capaz de aparecer personalmente en el asunto.*

(3) The [REDACTED] letter also stated that claimant failed to work in the field on October 6, 2006 as required by the employer and that claimant had falsely stated that his son had a doctor's appointment on that date in order to avoid that work. In addition, the letter stated that claimant attended a PERS meeting on October 6, 2006 without authorization.

(4) On October 6, 2006, claimant was scheduled to work in the field at Blue River, Oregon which was approximately 138 miles from claimant's home. Claimant lived in Milwaukie, Oregon which was approximately 50 miles from his normal work site in Salem, Oregon. Prior to October 6, 2006 claimant told his manager that his son had asthma and that claimant wanted to stay close to home in case there was an emergency. Claimant's manager told claimant that due to his concerns claimant would not be required to work in the field on October 6, 2006.

(5) Claimant reported to his normal Salem, Oregon work site on October 6, 2006. On that date, claimant also attended a PERS meeting in Salem along with other employees. Claimant understood that he was authorized to attend the meeting.

### CONCLUSIONS OF LAW

The claimant was discharged but not for misconduct.

### OPINION

The employer discharged claimant on [REDACTED]. ORS 657.176 provides, in relevant part:

(2) An individual shall be disqualified from the receipt of benefits \* \* \* if \* \* \* the individual:

(a) Has been discharged for misconduct connected with work;

\* \* \* \* \*

The standards applicable to a discharge case are further clarified in an administrative rule adopted by the Employment Department. OAR 471-030-0038(3) provides, in relevant part:

(3)(a) As used in ORS 657.176(2)(a) and (b) a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct.

(b) Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct.

\* \* \* \* \*



OAR 471-030-0038(1) provides, in relevant part:

(1)(c) As used in this rule, "wantonly negligent" means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

(d) As used in this rule, the following standards apply to determine whether an "isolated instance of poor judgment" occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

\* \* \* \* \*

The employer did not participate in the hearing and thus offered no explanation for discharging claimant. However, claimant testified as to the contents of a discharge letter sent by the employer on [REDACTED]. The letter listed a number of reasons for discharging claimant.

First, the employer contended that claimant was arriving to work late and working past his scheduled work hours. The employer has the right to set work hours and to require employees to follow the schedule. However, claimant credibly testified that he observed that the employer allowed employees to be fairly flexible. To the extent that claimant was mistaken about the employer's latitude, claimant's conduct appears to have been the result of a good faith error and not due to willful or wantonly negligent conduct.



**Addition to Previous Complaint by [REDACTED]**  
**NOTICE OF CLAIM:**

**Sent by Facsimile to:** Yasmin Yorker, Assistant Director  
US Environmental Protection Agency  
Office of Civil Rights (1201A)  
1200 Pennsylvania Ave NW, Washington, DC 20460  
(202) 564-7272 (voice), (202) 501-1836 (fax)  
March 27, 2007

(A) A claim for damages will be asserted against the Oregon Department of State Lands (DSL), Michael Morales manager. DSL is a recipient of federal funds from US EPA. DSL further refused to address an environmental violation in Blue River, Oregon (in violation of Title VI of the Civil Rights Act of 1964), by firing me. Please contact [REDACTED] the complainant at [REDACTED] (voice).

(B) I was employed as a [REDACTED]. I opposed employment discrimination based on my race, my color, my national origin, my age, and retaliation. On or about [REDACTED], I was discharged from my employment.

I believe that I was discharged in retaliation for opposing discrimination as described above, in violation of Title VI of the Civil Rights Act of 1964, which prohibits recipients of federal financial assistance from discriminating based on race, color, or national origin in their programs or activities. Title VI itself prohibits intentional discrimination. This is being sent to you because EPA's Office of Civil Rights (OCR) is responsible for the Agency's administration of Title VI.

I believe that I was discharged in retaliation for opposing discrimination as described above, in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act, as amended. I also believe that I was discharged because of my race, my color, and my national origin, in violation of Title VII, and my age, in violation of the ADEA.

(C) [REDACTED]

Thank you  
[REDACTED]

PS: Please let me know that you received this notice by Fax Reply to  
Attention: [REDACTED]